7-13-2012

Island Woods Homeowner's Ass'n v. Mc Gimpsey Respondent's Brief Dckt. 39698

IN THE SUPREME COURT OF THE STATE OF IDAHO

ISLAND WOODS HOMEOWNERS ASSOCIATION, INC, an Idaho corporation,

Plaintiff-Respondent,

v.

PHILIP P. MC GIMPSEY,

Defendant-Appellant,

and

JOLENE MC GIMPSEY, and STERLING DEVELOPMENT AND MORTGAGE CO., a Montana corporation,

Defendants.

Supreme Court No. 39698-2012

Ada County Docket No. 2011-6462

RESPONDENT'S BRIEF

Appeal from the Fourth Judicial District, Ada County, Idaho
HONORABLE CHERI C. COPSEY, Presiding

Appealed from: The Memorandum Decision and Order signed and filed on May 24, 2012.

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I. STATEMENT OF THE CASE

This appeal is the culmination of almost six years of unnecessary litigation that has been perpetuated ad nausea by Appellant-Defendant Phillip McGimpsey ("McGimpsey"). Rather than comply with valid CC&Rs, McGimpsey has taken a path of increasing self-destruction that required IWHA to file two separate lawsuits and oppose two separate appeals, while incurring more than $100,000 in attorney fees, and ultimately resulted in the execution sale of the McGimpseys' real property. This appeal is McGimpsey's final opportunity to prolong his litigation with IWHA and waste judicial resources on frivolous arguments.

A. The First Lawsuit Regarding Landscaping and McGimpsey's Frivolous Defense.

Jolene and Philip McGimpsey (the "McGimpseys") were married in 1993 and previously lived in Montana. In 2001, they purchased real property at 335 E. River Quarry Drive, Eagle, Idaho 83616 (the "Property"), which is located within the Island Woods Subdivision. In September of 2004, they began construction of a residence on the Property. By October 25, 2005, the City of Eagle had issued a Certificate of Occupancy, and the McGimpseys began occupying the residence a few days later. (Respondent's Augmented Record ("RAR") RAR00067, RAR00157-158.)

After residing at the Property for almost one year, the McGimpseys had failed to complete the landscaping at the residence, as required by the CC&Rs. IWHA contacted McGimpsey by letter on September 5, 2006, and notified him that he had failed to submit a landscaping plan and complete the minimum landscaping improvements as required by Article

IX of the applicable CC&Rs. After several more communications from IWHA about the issue, McGimpsey asserted that he was not yet obligated to complete the landscaping, despite his occupancy for more than a year. (RAR00158-00159)

Therefore, on November 3, 2006, IWHA filed its first lawsuit against McGimpsey in Case No. CV OC 0620675 (the "2006 Case"). The Complaint alleged that McGimpsey was an owner of the Property in the Island Woods Subdivision and was therefore subject to certain covenants and restrictions that ran with the land but that McGimpsey refused to comply with those covenants and restrictions. (Clerk's Augmented Record on Appeal ("CAR") 000008-26) On July 9, 2007, IWHA brought a motion for summary judgment. On October 31, 2007, the Honorable Patrick H. Owen entered an order granting summary judgment, which stated that McGimpsey's interpretation of the CC&R provisions was "not reasonable," ordered his compliance with the landscaping requirements, and then indicated that the Court would "consider plaintiff's request for attorney's fees and costs upon receipt of a separate detailed written request." (RAR00143-153)

McGimpsey immediately filed a motion to alter or amend summary judgment, asserting the same unreasonable arguments. This became the pattern of his approach, constantly re-litigating issues and multiplying the litigation procedures and cost by any means possible. IWHA filed its motion for fees and costs incurred through November 2, 2007 and McGimpsey opposed the fees. Hearing on the fees and costs bill and the motion to reconsider was set for February 11, 2008 and then continued to March 5, 2008. (RAR00127-131)

B. Facing an Imminent Judgment for Fees and Costs, McGimpsey Records the Purported Mortgage that Allegedly Secures a Debt to a Montana Corporation that McGimpsey Created and Directs.

On February 29, 2008, McGimpsey recorded a document entitled "Real Estate Mortgage" with the Ada County Recorder ("Purported Mortgage"). The Purported Mortgage states that it was made effective February 28, 2008 between McGimpsey and Sterling Mortgage and created a mortgage on the Property in exchange for "consideration of the sum of Ten Dollars ($10.00) in hand paid by Mortgagee." The Purported Mortgage makes no other reference to any particular promissory note or loan extended by Sterling Mortgage. In fact, any construction on the property had been completed for several years. McGimpsey is the only signatory on the Purported Mortgage. Prior to the Purported Mortgage, the McGimpseys owned the Property free and clear of any voluntary or involuntary liens other than tax liens. (RAR00069-77, RAR00080-82)

Sterling Mortgage is a Montana Corporation that was incorporated in 1994 by McGimpsey. The Articles of Incorporation for Sterling Mortgage indicate that the McGimpseys were the only two original directors and McGimpsey was the registered agent, incorporator, and signatory on the Articles of Incorporation. From 1995-2008, the only listed directors and officers of Sterling Development were the McGimpseys. In Sterling Mortgage's 2010 Annual Report, filed by McGimpsey, both of the McGimpseys were removed as officers and directors of Sterling Development and a new individual, James Ployhar, with the same PO Box address previously listed for the McGimpseys, was listed as the sole director and officer. From 1995-

2010, McGimpsey filed all of the annual reports for Sterling Mortgage, and Sterling Development reported that it had no shares issued and no shareholders. (RAR00087-125)

C. Judge Owen Awards Fees and Costs on Three Separate Occasions to IWHA for McGimpsey's Consistently Frivolous Arguments.

On April 21, 2008, the District Court issued its Memorandum Decision and Order in the 2006 Case which denied McGimpsey's motion to reconsider summary judgment and also granted attorney fees and costs pursuant to Idaho Code § 12-121. The District Court concluded, "McGimpsey's interpretation of the scope of the exemption is so unreasonable, given the language of the CC&Rs and McGimpsey's own prior written acknowledgment of his duty to complete the landscaping, that the District Court is constrained to find that McGimpsey's defense in this case was unreasonable and without foundation." (RAR00168) On May 28, 2008, the District Court entered a Judgment against McGimpsey for $16,354.20 in attorney fees and costs ("First Judgment"), and IWHA recorded the judgment in Ada County on June 4, 2008. (RAR00175-176)

McGimpsey filed a second motion to reconsider in the District Court. On May 2, 2008. On June 9, 2008, McGimpsey filed an appeal of the 2006 Case. The appeal went forward at the same time that McGimpsey continued to file motions in the 2006 Case. On June 3, 2008, the District Court entered an Order Denying Successive Motion to Alter or Amend Final Summary Judgment. (RAR00178-169) IWHA then filed a supplemental request for its additional fees and costs incurred through June 4, 2008. The District Court granted that request and concluded, "McGimpsey's challenges to both the October 31, 2007, summary judgment ruling and the

April 22, 2008, decision were unreasonable and without foundation." (RAR00184) On November 25, 2008, the Court entered a "Judgment" against McGimpsey for $9,062.60 ("Second Judgment"), and IWHA recorded the judgment in Ada County on March 30, 2009. (RAR00127-131, RAR00187.)

McGimpsey continued to file various motions before the District Court, including a motion to vacate the Order granting the supplemental fee request, a motion to quash writs of execution, and a motion objecting to certain pleadings included in the record on appeal. The District Court found in IWHA's favor on all of these issues. (RAR00191-200) On June 1, 2009, IWHA filed its third request for its additional fees and costs incurred through May 27, 2009. Judge Owens awarded all those fees and stated (for the fourth time), "McGimpsey's conduct of this entire litigation is unreasonable and without foundation." (RAR00203) On October 21, 2009, the District Court entered a Second Supplemental Judgment against McGimpsey for $11,813.39 ("Third Judgment"), and IWHA recorded the judgment in Ada County on November 4, 2009. (RAR00206)

D. McGimpsey's Unsuccessful Appeal of the 2006 Case That Results in Another Judgment Lien for Fees and Costs.

As previously noted, on June 9, 2008, McGimpsey began an appeal of the 2006 Case. The Court of Appeals took the appeal under advisement on the briefs, without need for a hearing. On March 24, 2010, the Court of Appeals issued its order affirming Judge Owens in all respects, including his finding that "McGimpsey's defense in this case was unreasonable and without foundation" and his award of the both the First and Second Judgment (the Third Judgment had

not yet been entered). The Court of Appeals concluded, "IWHA is the prevailing party on appeal, and we conclude that McGimpsey's appeal has been brought frivolously, unreasonably, and without foundation. . . . Costs and attorney fees are awarded to IWHA on appeal." (RAR00209-221) On June 3, 2010, the Court of Appeals issued an Order Awarding Attorney Fees and Costs in the amount of $18,240.00 ("Fourth Judgment"), and IWHA recorded the judgment in Ada County on June 7, 2011. (RAR00223-224)[1] The time for any additional appeal of any of the four judgments has long since passed.

E. IWHA's Attempt at Collection on Its Four Judgments and the Complications Caused by the Purported Mortgage.

IWHA attempted to collect on its four judgments. McGimpsey indicated that he was retired and had no discretionary income. IWHA attempted several bank garnishments that were unsuccessful; the second garnishment uncovered $300 which McGimpsey claimed as exempt. (RAR00226)

IWHA noted that the McGimpseys owned a valuable home, but the Purported Mortgage had priority over the IWHA judgments and it was unclear how much debt the Purported Mortgage secured. IWHA recognized that a sheriff sale on the home would likely be unsuccessful because bidders would be deterred by the mortgage in an undisclosed amount and/or the likelihood of having to litigate with McGimpsey about the Purported Mortgage.

[1] McGimpsey filed a second appeal on September 14, 2010, challenging Judge Owen's orders that required McGimpsey to appear for a debtor exam and that denied McGimpsey's motion to quash the subpoena related to the debtor exam. In an Order Dismissing Appeal issued on October 28, 2010, McGimpsey's second appeal was dismissed sua sponte by this Court because the appeal was not from a final, appealable order or judgment.

Therefore, IWHA went forward with a debtor exam to determine whether the Purported Mortgage to Sterling Mortgage was legitimate, whether there was sufficient equity in the Property notwithstanding any amounts secured by the Purported Mortgage, and/or whether the McGimpseys had other non-exempt assets for execution.

After failing to appear for the initial debtor exam hearing, which resulted in a motion for contempt, McGimpsey appeared on November 8, 2010 and provided testimony about his assets. With regard to the Purported Mortgage, McGimpsey testified:

- The Property was initially worth $900,000 but was now worth approximately $550,000-$585,000.
- The cost of his purchase of the land was $203,000 and construction cost more than $700,000.
- The McGimpseys received a $500,000 construction loan from Sterling Mortgage.
- During construction, the McGimpseys made interest-only payments on the construction loan.
- In late 2006, the McGimpseys moved into the completed residence and in May of 2007 the construction loan was converted into a proprietary reverse mortgage.
- The reverse mortgage allows the McGimpseys to avoid paying any interest or mortgage payments on the Property. Instead, the McGimpseys have continued to borrow money against the value of the Property and now owe approximately $622,000 under the Purported Mortgage.
- The McGimpseys bought a mortgage insurance policy that allows them to continue growing the mortgage until the amount owed is $200,000 greater than the assessed value of the Property, at which point they would be forced to either pay cash to reduce the deficit below $200,000 or they would have to give a deed in lieu of foreclosure.

(RAR00243-262)

McGimpsey failed to produce any document related to a debt to Sterling Mortgage secured by the Purported Mortgage. McGimpsey indicated he would provide additional

documents, but he eventually only disclosed one additional document: a "Promissory Note" (the "Purported Note"). The Purported Note is a two page document dated May 31, 2007 and signed by McGimpsey that requires him to pay $499,950.00 to Sterling Development, with 6.37% interest that begins accruing on June 1, 2007. The Purported Note says that it is secured by McGimpsey's "undivided interest" in the Property. The only reference to a "reverse mortgage" is the stated "Term" of the note: "On Demand per Reverse Mortgage." The Purported Note is dated almost one year prior to the Purported Mortgage, yet the Purported Note is not referenced in the Purported Mortgage. The Purported Note contains none of the terms described during the debtor exam, *e.g.* nothing about how the McGimpseys would be allowed to borrow additional amounts against the house, how interest could go unpaid as part of a line of credit (in fact the Purported Note contains a late fee provision), and/or how default on the promissory note is determined. (RAR00084-85)

F. Filing the Underlying Lawsuit to Remove the Sham Purported Mortgage.

Based on the suspect timing of the recording of the Purported Mortgage, the obvious irregularities in the Purported Mortgage and Purported Note, McGimpsey's role in creating and controlling Sterling Mortgage, and McGimpsey's complete inability to provide the typical documents evidencing any debt, IWHA concluded that the Purported Mortgage and debt to Sterling Mortgage was likely a fraud to prevent IWHA from collecting its judgments from the McGimpseys' substantial equity in the Property. After giving McGimpsey every opportunity to stop with his fraud and enter into negotiations to pay his debt, IWHA was forced to bring the underlying lawsuit that is now the subject of this appeal.

On April 1, 2011, IWHA filed its Complaint seeking (1) an order that the Purported Mortgage is void and/or secures no monies and (2) an order that the Property shall be executed upon and sold at sheriff sale with the proceeds to pay both IWHA's judgment liens on the Property and IWHA's additional attorney fees and costs expended for this lawsuit. (CAR 000008-26)

On April 26, 2011, IWHA served Sterling Mortgage, through its newly appointed director James Ployhar, with the Complaint and Summons and IWHA's first set of discovery requests. (RAR000254, RAR00324-337) By way of the Complaint, Mr. Ployhar and Sterling Mortgage were put on notice that IWHA was seeking to void its lien interest in the Property because it secured no debt and/or was fraudulent. (CAR 000021-25) In addition, the discovery requests asked Mr. Ployhar and Sterling Mortgage to admit that the Purported Mortgage did not secure any loan to the McGimpseys and that Sterling Mortgage had no documents to evidence any loan to the McGimpseys. (RAR00329-332) For obvious reasons, Mr. Ployhar and Sterling Mortgage refused to get involved in the fraud so they failed to respond to the Complaint or the discovery requests. Thankfully, McGimpsey, a retired Montana lawyer without an Idaho law license, had no standing to represent Sterling Mortgage and perpetuate the fraud by speaking on behalf of Sterling Mortgage. Thus, the District Court entered default judgment on June 6, 2011, stripping the Purported Mortgage that had allegedly belonged to Sterling Mortgage. (RAR00052-53)

Mrs. McGimpsey was also included as a defendant in this action because of her ownership interest in the Property. She was served with the Complaint and Summons and then

with a first set of discovery requests that sought admissions and documents regarding the sham debt to Sterling Mortgage. (RAR00050, RAR00292-306) The Complaint put Mrs. McGimpsey on notice that the property was considered community property and would be sold to satisfy "all judgments owed by McGimpsey." (CAR 00022-26) Mrs. McGimpsey refused to get involved and failed to respond to the Complaint or the discovery requests. Thankfully, McGimpsey again lacked standing and an Idaho bar license and thus unable to raise any frivolous defenses on behalf of his wife. The Court entered default judgment on June 6, 2011 that stated, "Mrs. McGimpsey has not raised and cannot now raise any legal or factual objection to the Property being sold at sheriff sale in order to satisfy IWHA's outstanding judgment liens on the Property." (RAR00056-57)

McGimpsey was the lone remaining defendant. Continuing his pattern of attempting to delay and obstruct, he filed an Answer that continued to claim the Purported Mortgage was valid but provided no additional facts to support that claim. Instead, McGimpsey raised three frivolous counterclaims that all had to do with issues that he lost in the 2006 Case and on appeal and which are barred by claim and/or issue preclusion. (CAR 000117-136) He also refused to provide substantive responses to IWHA's discovery requests, denying all the admissions without explanation. He refused to respond to the interrogatories or requests for production and instead filed an illogical request for a protective order. (RAR00339-345) In addition to the frivolous Answer and discovery responses, McGimpsey filed a Rule 17(a) Motion claiming that IWHA had not authorized the lawsuit, an argument he previously and unsuccessfully raised during the 2006 Case. (CAR 000137-143, RAR00360-364) The District Court rejected the motion.

With the Purported Mortgage stripped through default of its owner, IWHA proceeded with summary judgment for execution on the Property in order to satisfy all amounts owed by McGimpsey from his litigation against IWHA. (CAR 000166-188; RAR00060-64 and RAR00347-358) IWHA's counsel filed its initial briefing in support of summary judgment and then subsequently filed a brief clarifying that IWHA was seeking summary judgment as to all issues, including McGimpsey's frivolous counterclaims that were "barred by the doctrines of claim and/or issue preclusion." (CAR 000189-190)

In opposition to summary judgment, McGimpsey raised four issues that are now issues on appeal: Mrs. McGimpsey had a separate ownership interest in the Property that could not be used to satisfy the judgments against her spouse; the Fourth Judgment could not be paid out of the execution sale proceeds because it was not mentioned in the Complaint; the default judgment against Sterling Mortgage improperly voided the Purported Mortgage, which issue should have been resolved through a fraudulent transfer trial; and the counterclaims should not be dismissed. McGimpsey raised several other additional frivolous defenses that he has not raised on appeal. (CAR 000192-215)

In its reply, IWHA pointed out the obvious flaws in McGimpsey's defenses: only Mrs. McGimpsey had standing to claim her interest was a separate property interest, which she had not done and was precluded from arguing by her default judgment; the Property was community property and subject to either spouse's debt under Idaho law; the Fourth Judgment was properly recorded as a lien and the failure to mention it in the Complaint was harmless and irrelevant; the Purported Mortgage was properly voided by default judgment against the only party with a claim

to the lien and that default judgment mooted the fraudulent transfer claim; and the counterclaims were all clearly barred and were properly at issue in the summary judgment motion. (RAR00366-380) These obvious flaws are pointed out again in this brief.

On August 29, 2011, the Court orally granted summary judgment and issued a Final Judgment for IWHA. (CAR 000218) On October 4, 2011, the Court issued its Order Granting Plaintiff's Motion For Summary Judgment and Thereby Approving Foreclosure on Real Property, Dismissing Counterclaims, and Awarding Attorney Fees ("SJ Order"). The SJ Order granted all of the relief that IWHA had sought: execution and sale of the Property pursuant to Idaho Code § 11-101 *et seq.*, with proceeds used to pay first the McGimpsey's homestead claim and then the liens on the property and the additional fees that would be awarded to IWHA in the case, with any surplus proceeds returned to the Court for further order. The SJ Order also concluded that McGimpsey's defense of the litigation continued to be frivolous. (CAR 000220-225)

IWHA submitted its memorandum of fees and costs. (CAR 000226-237) In his opposition brief, McGimpsey argued (which argument it renews on appeal) that IWHA could only seek to recover fees it had actually paid to counsel, not fees that had been incurred but remained unpaid. (CAR 000251-266, CAR 000277-284) McGimpsey also filed a motion to reconsider summary judgment, arguing that the District Court judge was biased. (CAR 000243-248) The District Court eventually issued two rulings rejecting McGimpsey's claims of bias and his motion for reconsideration and then awarding all of IWHA's fees and costs. In its first ruling, the District Court detailed the "tortured history of this on-going litigation" and then it

provided a detailed explanation for how all of McGimpsey's counterclaims were barred by claim preclusion:

> In fact, McGimpsey argued both in the lower court and on appeal that his submitted landscape plans, including the April 14, 2006, plan identified in his counterclaims, complied with Article IX of the CC&Rs. In other words, having had that opportunity (which he in fact took advantage of), he cannot now challenge either the judgments or the results from the 2006 litigation.
>
> However, McGimpsey ignores the impact of the Court of Appeals decision and the fact he essentially made equivalent claims before that court. In response to an equivalent claim, the Court of Appeals ruled as follows:
>
> ". . . Moreover, even assuming that McGimpsey had sufficiently raised the issue [of whether landscaping plans had been properly submitted], his argument is without merit. While prior submission and approval of the landscaping plans was required, that requirement did not bear upon the applicability of Section 9 or the time frame for completion of landscaping."
>
> (RAR00213-214) . . .
>
> Likewise, while counterclaim three is entitled "unjust enrichment," its success relies on a successful challenge to the validity of the judgments from the 2006 case. In other words, in order to establish any unjust enrichment claim, the judgments would have to be invalid. Since he cannot use this litigation to do that, this counterclaim fails and the Court's decision granting summary judgment was correct.

(CAR 000286-299, CAR 000298-299). The District Court then issued its Order Granting Attorney Fees and Denying Rule 59(e) Motion, which explained:

> [B]ut for McGimpsey's obstreperous behavior, this entire case was very straightforward, uncomplicated and easy to decide. While McGimpsey also voices some concern about when the judgments from other cases were recorded, as the Court told him, the propriety of those judgments is not before the Court. The issues here were focused on whether Sterling Mortgage's mortgage was valid. Once default judgment was entered against Sterling Mortgage, invalidating the mortgage, any judgments recorded by Island Woods advanced in priority and Sterling Mortgage's lien would not prevent Island Woods from executing against McGimpsey's property.

(CAR 000319) The District Court determined IWHA was the prevailing party -- "McGimpsey succeeded in no way on any matter before this Court" – entitled to all its fees and costs incurred in a lawsuit that McGimpsey "defended unreasonably, without foundation, and for the purpose of increasing costs to Island Woods." The District Court explained:

> . . . McGimpsey raised not one legitimate issue.
>
> In this case, the evidence clearly establishes that Philip McGimpsey had no plausible defense to Island Woods' claims and that there was no basis for any of his counterclaims. As discussed in the Court's December 22, 2011 Memorandum, McGimpsey and his wife formed the very corporation, Sterling Mortgage, that had an alleged mortgage recorded against McGimpsey's property, claiming it was an arm's length transaction, and then used the alleged mortgage to thwart Island Woods' attempt to collect previously imposed costs and fees for his frivolous conduct in his other litigation with Island Woods, and on appeal. After reviewing the documents filed in support of Island Woods' litigation, and the Court of Appeals Decision, the Court finds that Philip McGimpsey has engaged in a pattern of filing material in court, lacking a legal basis or merit, and is often irrational – making an award in this case necessary. Based on this record, and from the prior litigation presented to this Court by Island Woods, the Court finds that McGimpsey is using the justice system to harass Island Woods, and his litigious behavior is burdening the courts with repetitious and unnecessary litigation. What clearly started as a simple matter has become a burdensome and wasteful enterprise.

(CAR 000322) The District Court rejected any argument that fees must have been "actually paid" by the client in order to be awarded, citing *Futrell v. Martin*, 100 Idaho 473, 479, 600 P.2d 777, 783 (1979) (*Id.*). Finally, the District Court concluded that the attorney fees and costs requested were reasonable: "This case was hard fought and its resolution required extensive effort by Island Woods because McGimpsey filed frivolous motions and responses. . . . This litigation should not have been necessary. Island Woods should not have to bear the costs of this

litigation. Any costs incurred were the direct result of McGimpsey's failure to behave reasonably." (CAR 000323-324)

On January 12, 2012, the District Court issued the Supplemental Judgment for $21,306.40, which was recorded that same day in Ada County. (CAR 000327-328) On January 27, 2012, an Amended Writ of Execution was issued and then forwarded to the Ada County Sheriff, along with the SJ Order, with instructions to execute upon the Property.

McGimpsey next filed three additional motions seeking to stay the execution. His Rule 59(e) Motion to Vacate or Amend Supplemental Judgment was summarily dismissed two days after McGimpsey filed his brief in support. His Rule 62 Motion for Stay of Execution and Sheriff's Sale and his Motion to Quash Amended Writ of Execution were both denied on March 19, 2012 after a hearing. (ROA00330-351, RAR00395-404, CAR 000358-360)

The original sheriff sale of the Property was set for February 28, 2012. On February 17, 2012, Defendant McGimpsey filed his Notice of Appeal. (CAR 000352-355) The appeal created a fourteen day statutory stay of execution and caused the first execution sale to be cancelled. The sale was eventually reset for March 27, 2012. On March 19th, McGimpsey filed one more pleading to stop the sale, an Application for Ex Parte Temporary Stay to this Court ("Temporary Stay Motion"). The sale went forward on March 27th, and the Property was sold to a third-party. McGimpsey retains his statutory redemption rights for six months. The proceeds of the sale went first to the McGimpseys for their $100,000 homestead exemption and then to pay the multiple judgments to IWHA, with approximately $90,000 in surplus proceeds. On March 28th, this Court issued its Order denying the Temporary Stay Motion.

On March 30, 2012, IWHA filed a supplemental request for its fees and costs incurred in responding to the many motions and other challenges brought by McGimpsey after the SJ Order. IWHA also asked the Court to retain an additional $20,000 from the execution sale proceeds in the event that IWHA is required to litigate this appeal and is ultimately awarded attorney fees and costs. (RAR00407-438) On May 24, 2012, the Court issued its Memorandum Decision and Order that awarded the supplemental fees and costs and also granted the request to set aside the additional $20,000 from the surplus proceeds. The Court explained:

> The history of this litigation is beset with McGimpsey's delay tactics and repeated motions filed without foundation. McGimpsey caused this litigation by simply refusing to landscape his yard. Island Woods is an upscale subdivision and McGimpsey would not landscape his yard. Like the litigant in *Peasley*, because he represents himself, he is not incurring any costs for his actions. He has proven himself more interested in abusing the homeowner's association than in resolving this litigation reasonably. Furthermore, by creating this "mortgage company" in Montana and having it file a "mortgage" against what he testified is his *only* asset, he was attempting to insure he would not incur any costs. He then sought to harass the non-profit homeowner's association by repeatedly filing nonsensical motions and memoranda clearly designed to do nothing but prolong this litigation. McGimpsey has shown a willingness to go outside the law, as demonstrated by his fabricated mortgage, in order to prevent a recovery on judgments owed. McGimpsey testified that he has no other assets besides the Property that has now been executed upon. Thus, the only funds now available for attorney fees and costs are those surplus funds being held by the court.
>
> Analogous to the indigent appellee in *Peasley*, Island Woods, as a non-profit organization, represents its homeowners and relies on those homeowners to contribute through dues. It is not a money making organization. Those fees and costs have now reached over $100,000 where all it was trying to do was to enforce its CC&Rs.
>
> This Court determined that based on the facts of the previous litigation, the subsequent appeal and the current litigation that attorney fees and costs should be awarded to Island Woods under I.C. § 12-121. The current appeal is not unlike the prior one. McGimpsey has been and is continuously told his actions

> are frivolous. The Court of Appeals found that McGimpsey's arguments were frivolous and awarded Island Woods $18,240.00 in fees and costs. The issues in the present action are extremely similar to those found in the previous litigation and appeal. Island Woods represented to the Court that in responding to McGimpsey's various arguments on appeal, it expects to incur another $20,000 in attorney fees and costs.
>
> If McGimpsey is successful or the appellate court rules attorney fees should not be awarded to Island Woods, the funds obviously will be released to McGimpsey and his wife.
>
> However, based on its concerns that should Island Woods be successful and awarded attorney fees on appeal, McGimpsey would continue this frivolous litigation by claiming he did not have any assets and once again Island Woods would have to pursue him. Therefore, in an exercise of discretion, the Court orders that an additional $20,000 be withheld from the surplus funds currently being held by the court for distribution for a potential attorney fees award on appeal.

(Appellant's Augmented Record, Memorandum and Order, May 24, 2012, pp. 7-9 ("AAR"))

After almost six years of constant and consistent misuse of the judicial system to harass IWHA, McGimpsey now has only this appeal to pursue. IWHA asks this Court to deny the appeal, make one final award of fees and costs under Idaho Code § 12-121, and put an end to this unnecessary and wasteful litigation.

II. ADDITIONAL ISSUES ON APPEAL

Respondents are entitled to attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41 due to the Appellant's failure to identify any misapplication of the law and/or abuse of discretion by the District Court. This argument is addressed in detail later in this brief.

III. ARGUMENT

A. Standard of Review.

McGimpsey challenges the entry of default judgment against Sterling Mortgage, the entry of summary judgment against himself, and the execution process used to sell his Property and satisfy the debts owed to IWHA. With regard to McGimpsey's various legal challenges to the default judgment and the execution process, the Appellate Court's standard of review on questions of law is *de novo*. *Martin v. Camas County ex rel. Bd. of Comm'rs,* 150 Idaho 508, 511, 248 P.3d 1243, 1246 (2011). In an appeal from an order granting summary judgment, the Appellate Court's standard of review is the same standard used by the District Court in ruling on a motion for summary judgment. *See Edmunds v. Kraner,* 142 Idaho 867, 871, 136 P.3d 338, 342 (2006); *U.S. Bank Nat. Ass'n v. Kuenzli,* 134 Idaho 222, 225, 999 P.2d 877, 880 (2000); *First Sec. Bank v. Murphy,* 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law summary judgment is proper." IRCP 56(c). Summary judgment is "not a disfavored procedural shortcut;" rather, it is the "principal tool. . . . by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Paugh v. Ottman,* 2008 U.S. Dist. LEXIS 52281, *9-10 (D. Idaho 2008) (quoting *Celotex Corp. v. Catrett.*, 77 U.S. 317, 377 (1986) (alterations in original)).

The application of these legal standards to the facts, law and record of this case can only result in one conclusion: all of the decisions of the District Court should be affirmed, as will be more fully explained in the sections below.

B. The District Court Did Not Commit Error When It Stripped the Sham Purported Mortgage Based on the Default of Sterling Mortgage.

McGimpsey's first argument on appeal is that the District Court erred in granting a default judgment against Sterling Mortgage that stripped the Purported Mortgage. He does not deny that Sterling Mortgage was the party of record allegedly entitled to the mortgage lien on the Property, that Sterling Mortgage was properly served with the Complaint, that the Complaint put Sterling Mortgage on notice that the Purported Mortgage would be voided if it failed to respond to the Complaint, or that default was properly entered against Sterling Mortgage. McGimpsey never raised those issues below and cannot raise them now. Instead, he argues that the default judgment against Sterling Mortgage could not address the validity of the Purported Mortgage because that issue had to be resolved through a fraudulent transfer trial against McGimpsey. This is a question of law that requires *de novo* review. The District Court was correct in finding that default judgment was properly entered against Sterling Mortgage stripping the Purported Mortgage.

The Purported Mortgage allegedly granted a lien right to Sterling Mortgage, not McGimpsey, and thus Sterling Mortgage was the only entity with standing to determine whether to retain, release, and/or defend that lien right. Once Sterling Mortgage determined not to defend the lien right by failing to answer the Complaint, no other party remained with standing to

defend the lien right. Thus, the invalidity of the Purported Mortgage was conclusively resolved and the District Court properly entered judgment stating that the Purported Mortgage "is found to secure no money owed to Sterling Mortgage by McGimpsey [and] . . . is void and cannot be used to secure any future indebtedness or purported indebtedness between McGimpsey and Sterling Mortgage, [and] . . . the Property can be sold free and clear of the Purported Mortgage and free and clear of any Sterling Mortgage interest in the Property." (RAR00052-53)

Sterling Mortgage received a copy of the default judgment and did not raise any late challenge. McGimpsey had no legal standing to challenge those factual and/or legal conclusions contained in the default judgment. The District Court properly rejected McGimpsey's attempt to oppose the default judgment entered against Sterling Mortgage: "While McGimpsey attempts to raise issues related to Sterling Mortgage and Jolene McGimpsey, since he is not licensed to practice in Idaho, he cannot represent either. A pro se individual may only represent himself; he cannot represent the corporation because the corporation is considered a separate entity." (CAR 000294)

McGimpsey, however, argues that default judgment could not be entered against Sterling Mortgage because not all defendants had been defaulted. McGimpsey relies on *Frow v. De La Vega,* 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872), which is clearly inapplicable. The *Frow* rule is only applicable for codefendants facing lawsuit on a theory of joint liability such that "no one defendant may be liable unless all defendants are liable." Where there is joint liability, default judgment cannot be entered until trial of all the other potentially jointly liable defendants in order to avoid any inconsistent judgments. *Frow* does not prevent judgment from being entered when

codefendants are facing independent theories of liability, as in this case. *See, e.g.*, *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8th Cir. 1997) ("*Frow* has no bearing on this case, however. Although [the defaulted codefendant] and [the other defendant] share closely related interests, they were not codefendants facing lawsuit on a theory of joint liability, where 'no one defendant may be liable unless all defendants are liable.'"); *Int'l Controls Corp. v. Vesco,* 535 F.2d 742, 746-47 n. 4 (2d Cir.1976) (". . . at most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others").

Here, Sterling Mortgage and McGimpsey were not jointly liable regarding the Purported Mortgage. IWHA believed the Purported Mortgage was a fraud and Sterling Mortgage did not have a real lien securing any debt. Hence, IWHA's Complaint asked for a determination against Sterling Mortgage that the Purported Mortgage was invalid. Alternatively, if the lien did secure real loaned funds, it was a fraudulent transfer from McGimpsey because he granted the lien for the alleged Purported Note that had been signed one year prior to the Mortgage being signed and recorded. Fortunately, Sterling Mortgage defaulted as to the invalidity of the Purported Mortgage which mooted the alternative claim for fraudulent transfer. The entry of default judgment against Sterling Mortgage created no risk for an inconsistent ruling against McGimpsey, so default judgment was properly entered and the Purported Mortgage was properly voided. McGimpsey's frivolous argument regarding *Frow* should be rejected.

C. The District Court Did Not Commit Error When It Awarded Fees And Costs For Unpaid But Reasonably Incurred Attorney Fees.

McGimpsey's second argument on appeal is that the District Court could not award any attorney fees for IWHA. The District Court awarded attorney fees and costs under Idaho Code § 12-121. McGimpsey does not challenge the allowance of the fees or the amount as being unreasonable.[2] Instead, McGimpsey argues that the attorney fees were improperly awarded because they were only incurred and not "actually paid." The District Court rejected this argument, stating: "McGimpsey claims that the Court cannot award attorney fees to Island Woods unless Island Woods proves that it actually paid its attorneys. He is wrong. The Supreme Court ruled, in *Futrell v. Martin*, that attorney fees can be awarded to a party who is represented *at no cost* by an attorney provided by an insurance company." (CAR 000322) This question of law is reviewed *de novo.*

The District Court correctly rejected this frivolous argument. McGimpsey's interpretation of the attorney fee rules is not supported by rule or statute, is illogical, unreasonable and frivolous, and is rejected by case law. The only statute or rule that contains an "actually paid" requirement is the rule for costs as a matter of right. *See* IRCP 54(d)(1)(C). The other type of awardable costs, discretionary costs, is not subject to the "actually paid" requirement; discretionary costs only have to be "reasonably incurred." Attorney fees clearly are

[2] McGimpsey does make generic challenges to the amount of fees awarded to IWHA, arguing "is it reasonable to award fees to a law firm who doesn't really do the work?" and then arguing "The District Court did the work. Plaintiff's counsel certainly didn't deserve the fee award." (Appellant Brief, pp. 24-25) It is unclear what specific fees McGimpsey is challenging. His generic arguments are not sufficient to raise any appellate issue regarding the reasonableness of the amount of the fee awards.

not costs as a matter of right and therefore are not subject to the "actually paid" requirement in that rule. Attorney fees are only related to costs for purposes of making a joint request for fees and cost: "Attorneys fees . . . shall be deemed as costs in an action and *processed in the same manner* as costs and included in the memorandum of costs." IRCP 54(e)(5) (emphasis added).

In fact, such an interpretation of IRCP 54(e)(5) is illogical because it undermines the purpose of the attorney fee statutes. Attorney fee statutes allow meritorious claims to be brought in court because the prevailing party can shift its attorney fees costs to the losing party. Thus, parties with just causes but insufficient financial resources can still hire legal counsel with the expectation that the legal counsel will ultimately recover from the opposition. McGimpsey's interpretation would mean the prevailing party could only impose the actual costs of litigation on the unsuccessful party if the prevailing party could first afford to pay the fee bill. Many worthy causes could never be litigated if the client was forced to pay its own attorney fees before it could then recover those fees from the losing party. This case is the perfect example. IWHA could never have afforded legal representation in this matter if the rules required IWHA to pay its $100,000 legal bill prior to seeking reimbursement from McGimpsey.

In addition, McGimpsey's interpretation would prevent attorney fee awards from being resolved immediately after final judgment. For example, as IWHA is financially able to pay its attorney fee obligation over time, McGimpsey would then have parallel liability arising for those "actually paid" attorney fees. Such a result is unworkable.

The District Court pointed out two cases that specifically reject McGimpsey's interpretation. In *Futrell v. Martin*, 100 Idaho 473, 479, 600 P.2d 777, 783 (1979), the Court explained:

> Appellants also assert that respondents should not be awarded attorney fees at the trial level because respondents did not incur any attorney fees inasmuch as they were represented by their insurance company. We find no merit in this position. The purpose of I.C. § 12-121 was in proper cases to impose the actual costs of litigation on the unsuccessful parties, in the court's discretion.

see also Brown v. Matthews Mortuary, Inc., 118 Idaho 830, 841, 801 P.2d 37, 48 (1990) (reaching same result); *Application of Robison*, 107 Idaho 1055, 1058, 695 P.2d 440, 443 (Ct. App. 1985) (attorney fee request by pro bono attorney, denied on other grounds).

McGimpsey's unreasonable and frivolous litigation has caused IWHA to incur fees that McGimpsey must pay and his argument that attorney fees are only awardable if "actually paid" is yet another unreasonable and unsupportable argument.

D. The District Court Did Not Err In Finding No Error in the Amended Writ of Execution.

McGimpsey's third argument on appeal is that the District Court should have stopped the execution sale based upon some perceived math errors contained in the Amended Writ of Execution. The District Court rejected this argument without much discussion. (CAR 000358-359). McGimpsey's argument is frivolous for two independent reasons.

First, McGimpsey has utterly failed to show what mathematical errors are contained in the Amended Writ. McGimpsey made the mathematical errors. In his appellant brief, McGimpsey does not even specify what errors he believes are contained in the Amended Writ.

Instead, he makes vague reference to arguments raised in prior motions before the District Court. McGimpsey's miscalculations regarding the Amended Writ are based on his misunderstanding of when interest accrues. McGimpsey believes interest accrues only after the judgment is recorded. Actually, the judgment accrues interest immediately upon being issued and recording is only relevant for purposes of creating a lien. McGimpsey was already shown his mistake in the earlier briefing on this motion, yet he persists with this frivolous and incorrect argument. The Amended Writ was properly calculated.

Second, even if some minor mathematical error was made, that error would not prevent the execution sale from going forward or invalidate a completed execution sale. Instead, that alleged error would only impact the amount of execution sale proceeds paid to IWHA. McGimpsey cites numerous statutes but none of them support his conclusion that an execution sale is invalid if there is an error (which there was not) about the calculation of interest. If McGimpsey wanted to properly raise the issue on appeal, then he should have argued that he is entitled to a reimbursement, not voiding of the sale.

In sum, McGimpsey's argument that the Amended Writ was miscalculated was flawed and properly rejected by the District Court because the writ was correctly calculated. His argument on appeal that a math error for a writ of execution should invalidate an execution sale is illogical and should also be rejected.

E. The District Court Did Not Err In Dismissing the Counterclaims Based on Issue and/or Claim Preclusion.

McGimpsey's fourth argument on appeal is that the District Court erred in dismissing his

counterclaims at summary judgment. McGimpsey makes no affirmative arguments to show how his counterclaims were not barred by issue and claim preclusion. Instead, he merely argues that IWHA did not provide sufficient evidence to defeat the counterclaims. The District Court rejected this argument, pointing out that "Island Woods carefully provided this Court copies of the earlier decisions in the 2006 litigation in its various exhibits." (CAR 000298). The District Court also provided a detailed discussion of why the counterclaims were barred by claim preclusion. (CAR 000296-299) Claim preclusion is a question of law that is reviewed *de novo*. The District Court correctly barred McGimpsey's counterclaims.

McGimpsey raises no substantive argument against issue or claim preclusion because he has no substantive arguments. Each of his counterclaims is an obvious collateral attack against the conclusions from the 2006 Case. In the 2006 Case, the court ultimately determined that McGimpsey had violated the CC&Rs and he was ordered to immediately comply and to complete the required landscaping. McGimpsey appealed that case and lost his appeal. McGimpsey had no further options for challenging the CC&Rs and the enforcement actions taken by IWHA.

McGimpsey tried to re-litigate the 2006 Case, particularly the CC&R and landscaping issues, through his three counterclaims. In each of the counterclaims McGimpsey asserted that IWHA had lied during the 2006 Case and that it was actually IWHA that was in breach of the landscaping provisions because McGimpsey allegedly provided the required landscaping plan. The issues of whether McGimpsey had provided the required landscaping plan, whether it was improperly rejected, whether IWHA improperly brought suit regarding the landscaping, and

whether IWHA was making misstatements to the Court were all ripe for adjudication during the 2006 Case and should have been resolved during that litigation. McGimpsey cannot raise them again in this litigation. *See, e.g.*, *Waller v. State, Dept. of Health and Welfare*, 146 Idaho 234, 237, 192 P.3d 1058, 1061 (2008) (discussing both claim and issue preclusion); *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123-27, 157 P.3d 613, 617-21 (2007) (same).

IWHA provided more than enough evidence to support summary judgment dismissal of the counterclaims. IWHA provided the District Court with all of the relevant pleadings in the 2006 Case and appeal that showed that McGimpsey was merely trying to collaterally attack the 2006 Case through his counterclaims in this case. (RAR 00143-52, 00157-72, 00181-84, 00191-203, 00209-221)

McGimpsey also takes great issue with the Clarification brief filed by IWHA. The initial motion for summary judgment was intended to resolve the entire case but it did not mention the counterclaims. Hence, the Clarification brief was filed to explicitly challenge the counterclaims and assert issue and claim preclusion. McGimpsey provides no explanation for how he was harmed by IWHA's failure to mention the issue in the initial memorandum in support of summary judgment. IWHA provided McGimpsey with sufficient time to respond to the challenge to his counterclaims, McGimpsey does not claim otherwise, and the District Court concluded that the counterclaims were properly at issue at summary judgment. (CAR 000295) McGimpsey instead cites inapplicable cases discussing how the initial appellant brief must contain all issues on appeal. The standard, of course, is different at the district court level where issues do not have to be resolved all at once and failure to challenge the counterclaims during the

initial motion for summary judgment would not have prevented a subsequent challenge on summary judgment.

The counterclaims were properly at issue on summary judgment and were properly dismissed. McGimpsey has no non-frivolous argument for opposing the dismissal of his counterclaims.

F. The District Court Did Not Err In Applying Proceeds of the Execution Sale to Pay All Judgment Liens of Record.

McGimpsey's fifth argument on appeal is that the Fourth Judgment should not have been satisfied out of the proceeds of the execution sale of the Property. McGimpsey notes that the Fourth Judgment was not mentioned in the Complaint and was recorded as a lien after the Complaint was filed. McGimpsey does not contest that the Fourth Judgment was a valid judgment, was validly recorded as a lien, and therefore could be executed upon. McGimpsey apparently is just arguing that IWHA needed to amend the Complaint to add the Fourth Judgment before it could then execute upon the judgment. McGimpsey is making another frivolous and pointless argument.

IWHA inadvertently forgot to include the Fourth Judgment in the Complaint. In its summary judgment briefings, IWHA noted the error and asked the Court to order execution sale to pay the proceeds of all judgment liens, including the Fourth Judgment, which had by then been properly recorded to become an enforceable judgment lien. McGimpsey tried to delay summary judgment by arguing that an amended complaint needed to be filed to give notice of execution on the Fourth Judgment. The Court, however, properly concluded that such formalism

was not necessary and McGimpsey already had sufficient notice of IWHA's intent to satisfy all of its judgment liens out of the execution sale of the Property. The District Court repeatedly reminded McGimpsey that none of the judgments could be challenged in this litigation and thus all of them could be validly executed upon. (CAR 000299, CAR 000319)

An amended complaint was wholly unnecessary. *See, e.g.*, IRCP 15(a) (allowing trial court to "freely" amend the pleadings to match issues and evidence at trial). McGimpsey can make no argument for how this case would have been different if the District Court had required an amended complaint referencing the Fourth Judgment. The exact same summary judgment motion would have been filed and the same result would have been reached. If McGimpsey had any non-frivolous argument for why the Property should not be sold to satisfy the Fourth Judgment, then he had an opportunity to raise that argument on summary judgment. He had no non-frivolous argument and his arguments regarding the necessity of an amended Complaint were merely another effort to delay.

McGimpsey argues an error but he has not even attempted to show any real prejudice: "I'm not going to waste a lot of time discussing why a late filed claim may be slightly unfair or prejudicial to any or all of the defendants, except to note that the Fourth Judgment increased the Plaintiff's April 1, 2011 prayer request by approximately fifty percent." (Appellant Brief, p. 32) McGimpsey's only argument of prejudice is that he was forced to pay a valid judgment lien that greatly increased his obligation to IWHA. That is not prejudice.

McGimpsey's Property was properly sold to satisfy all judgment liens, including the Fourth Judgment. The District Court acted within its discretion to not require an amended

complaint and any procedural error was harmless.

G. The District Court Did Not Err In Concluding that the Entire Property Would be Sold and All Non-Exempt Proceeds Would Be Used to Pay for the Judgment Liens on the Property.

McGimpsey's sixth argument on appeal is that the Property could not be executed upon and sold to satisfy the money judgments recorded against the Property because those money judgments were against him personally but the Property was owned by he and his wife as tenants in common. The District Court rejected this argument on two separate legal basis, standing and Idaho's community property law:

> The execution proceeds were acquired from community property. There is a "general presumption that all property acquired during marriage is community property. The presumption places the burden of persuasion on the party asserting the separate character of the assets. That party must prove that the property is separate with reasonable certainty and particularity." *Speer v. Quinlan, In and For Lewis County*, 96 Idaho 119, 131, 525 P.2d 314, 326 (1973). The McGimpseys have failed to rebut this presumption. While McGimpsey argues that a showing is required of the respective ownership interests, Jolene McGimpsey failed to answer and the Court entered default judgment against her. Thus, this argument may only be brought by Jolene McGimpsey or her legal representative. McGimpsey does not qualify to represent his wife.

(AAR, pp. 6-7 & n.3) (citation omitted). The District Court was correct with both its reasons for allowing execution on the entire Property and proceeds.

This is another situation where McGimpsey is raising legal arguments on behalf of his wife. McGimpsey has no legal standing to argue that Mrs. McGimpsey has a separate ownership interest in the Property and that her interest cannot be sold and/or the proceeds cannot be applied to the judgment liens. If Mrs. McGimpsey believed she had a separate property interest rather

than a community property interest, she needed to raise that issue. In its Complaint, IWHA stated that it had valid judgments against McGimpsey, that the judgments were recorded against the Property owned by the McGimpseys as tenants in common, and that the judgments would all be satisfied by execution sale of the Property. Mrs. McGimpsey was properly served with that Complaint and she choose not to contest those issues, thereby conceding that her ownership interest was also subject to execution and payment of the judgments. The issue has been fully and finally decided pursuant to the default issued against Mrs. McGimpsey.

In addition, Mrs. McGimpsey was right in not challenging execution on her joint interest in the Property because Idaho law applies to Idaho real estate and pursuant to Idaho community property law, creditors can execute upon community assets in order to recover on both community and separate debts. The Property is a community asset under Idaho law and is liable for the judgment liens, whether they are community debts or the separate debts of McGimpsey.

Idaho law applies to the debt because the debt arose in Idaho, from an Idaho court, pertaining to litigation over Idaho property, and against a Defendant who was living with his spouse in Idaho. This debt has no connection with the state of Montana. Thus, Idaho's community property laws apply to this debt and the collection of this debt. Pursuant to Idaho law, this debt is a community debt because it arose during their marriage and was intended to benefit the community and the McGimpseys' residence. McGimpsey cannot argue that he was intending only to benefit himself by litigating regarding the landscaping of the marital residence. Under Idaho law, community debt can be recovered from all community assets. *See, e.g., Hegg v. I.R.S*, 136 Idaho 61, 63, 28 P.3d 1004, 1006 (2001) ("Community assets may be reached to

satisfy a debt incurred by one spouse's fraud committed during marriage even if the other spouse is completely innocent of the fraud and has no personal liability where the fraud benefits the community or occurs during the spouse's management of the community."); *Vail v. Vail*, 117 Idaho 520, 521, 789 P.2d 208, 209 (Idaho Ct. App. 1990) ("We begin by recognizing that parties have rights given to them by law . . . [and] that community debts generally are to be paid with community property.").

Of course, even if the judgments entered against McGimpsey were considered his separate debts, they could still be recovered against any community assets, including community real property. *See Credit Bureau of Eastern Idaho, Inc. v. Lecheminant*, 149 Idaho 467, 471, 235 P.3d 1188, 1192 (2010) ("The Lecheminants are mistaken because the debt does not need to be incurred for the benefit of the community in order for the community to be liable. This Court and the court of appeals have held that separate debts of either spouse may be paid from community property."); *Bliss v. Bliss*, 127 Idaho 170, 173, 898 P.2d 1081, 1084 (Idaho,1995); *Holt v. Empey*, 178 P. 703, 704 (Idaho 1919); *see also In re Marriage of Scoffield*, 258 Mont. 337, 341-342, 852 P.2d 664, 667 (Mont. 1993) (defining marital asset as "property acquired during marriage by either party" and marital debt as "debt incurred by either party during marriage"). Whether the debt is considered a community debt or McGimpsey's separate debt, it can be recovered against any community asset.

The Property is real estate located in Idaho and therefore is subject to Idaho law. Case law holds that real property purchased in a community property state is subject to the community property laws of that state, *i.e.* the situs of the real property is determinative. *See Restatement*

(Second) of Conflicts § 234 (1971). ("The effect of marriage upon an interest in land acquired by either or both of the spouses during coverture is determined by the law of the state where the land is."). It is, therefore, irrelevant that the McGimpseys were initially married in a non-community property state or that they were residing in a non-community property state when they purchased the Property. *See In re Marriage of Grecian*, 777 P.2d 283 (Mont.1989) ("The present case involves property located in California and the domicile of the parties has always been Montana. The Montana courts do not have jurisdiction over real property located outside its jurisdiction, nor would Montana law apply.").

It is also not determinative that the McGimpseys decided to own the Property as tenants in common. *See, e.g.*, 15 Am. Jur. 2d Community Property § 19 ("The form in which title to property stands and the name under which property is held generally is not determinative of the classification of the property as separate or community."). Idaho law determines the ownership of properly based on the source of the funds used to purchase the property. *See Winn v. Winn*, 105 Idaho 811, 813, 673 P.2d 411, 413 (1983); *Stanger v. Stanger,* 98 Idaho 725, 728, 571 P.2d 1126, 1129 (1977) ("The status of property acquired during marriage is determined by the funds with which it is purchased."); *Cargill v. Hancock,* 92 Idaho 460, 464, 444 P.2d 421, 425 (1968) (holding that the central question in determining the character of property acquired during the marriage is the source of the funds with which it was purchased). If half of the source funds were separate property of one of the spouses, then titling the property as tenants in common will avoid any commingling and will keep the funds separate. *See* Idaho Code § 32-903 (Separate property is defined as "[a]ll other property of either the husband or the wife owned by him or her

before marriage, and that acquired afterward . . . either by gift, bequest, devise or descent, *or that which either he or she shall acquire with the proceeds of his or her separate property*, by way of moneys or other property, shall remain his or her sole and separate property."). However, if the funds used to purchase the Property were community property, then those community funds are not changed to separate property merely by titling the real property as tenant in common property. *See* Idaho Code § 32-903 (defining separate property, which does not include separate property being created merely through form of title taken); *see, e.g.*, *New Phase Investments, LLC v. Jarvis*, 2012 Opinion No. 101 (Idaho 2012) (noting that the parties "do not dispute" that the real property is community property because it was purchased during marriage, even though it was titled as "sole and separate property" of only one spouse).

Here, pursuant to Idaho's community property law, the Property was purchased during the McGimpseys' marriage so there is a presumption that it is community property. *See, e.g.*, *Reed v. Reed*, 137 Idaho 53, 58-59, 44 P.3d 1108, 1113-14 (2002); *Winn,* 105 Idaho at 815, 673 P.2d at 415 ("Principally, we remain mindful of the overarching policy in favor of community property, as evidenced by the general presumption and the strong standard of proof necessary to rebut the presumption."). This presumption can only be overcome if the party asserting the separate character of the property carries his burden of proving with reasonable certainty and particularity that the property acquired during marriage is separate property.

McGimpsey failed to provide the District Court with any evidence to show that the Property was purchased with Mrs. McGimpsey's separate property. McGimpsey has not overcome the presumption that the Property is a community asset. As a community asset, the

Property is subject to execution for all of McGimpsey's community and separate debts, including his judgments incurred through frivolous litigation against Plaintiff.

McGimpsey cites only one case, *Twin Falls Bank & Trust Co. v. Holley*, 111 Idaho 349, 352-54, 723 P.2d 893, 896-98 (1986), in support of his argument that the Property is not a community asset. The Twin Falls case, however, supports the opposite conclusion, reiterating that "under the community property system in Idaho . . . when either member of the community incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property." That case then goes on to hold that a divorce effects a permanent division of community property such that creditors are limited in what assets they can execute upon. Here, the McGimpseys are still married and the Property remains community property that is subject to the debt incurred by "either member of the community."

In sum, McGimpsey had no standing to challenge the execution sale and distribution of proceeds by arguing that his spouse had a separate property interest. In addition, Mrs. McGimpsey also could not have prevented the Property from being sold to satisfy the judgments because Idaho law applies to the Property, Idaho law holds that community assets are subject to the creditors of either or both spouses, IWHA is a creditor of one spouse and thereby can execute against community assets, and the Property is a community asset because it was purchased during their marriage and the McGimpseys have not overcome the presumption that it was purchased with community funds. It may be unfortunate that the McGimpseys may lose their

home because of the frivolous litigation brought by McGimpsey but all of this could have been avoided if the McGimpseys had taken one of several alternate paths to do right by IWHA.

H. The District Court Complied With Idaho Statute for the Execution on a Homestead.

McGimpsey's seventh argument on appeal is that the execution sale should be overturned because "there was zero effort and zero compliance with Idaho Code Sections 55-1101 *et seq.*" (Appellant Brief, p. 37) This is a question of law subject to *de novo* review. McGimpsey does not explain what additional statutory requirements should have been followed. His eighth issue on appeal challenges the lack of an appraisal, which is discussed in the next section of this brief. McGimpsey has never raised any other issues with how IWHA complied with Idaho Code § 55-1101 *et seq.* To the extent he is now raising a new argument on appeal, such argument is untimely and should be dismissed. *See, e.g., Whitted v. Canyon Cnty. Bd. of Comm'rs,* 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002) ("[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed.").

In addition, IWHA has complied with Idaho Code § 55-1101 *et seq.* Those statutes require that the homestead exemption must be protected during the execution process. In this matter, the homestead was fully protected throughout the execution sale process: the entire Property had to be sold as there was no way to divide it; the minimum bid required cash payment of the homestead; and the homestead exemption was paid to the McGimpseys immediately after the execution sale. McGimpsey can raise no non-frivolous argument regarding compliance with Idaho Code § 55-1101 *et seq.* He has retained his homestead exemption.

I. The District Court Did Not Err In Not Requiring An Appraisal of the Property Prior to Execution Sale.

McGimpsey's eighth and final argument on appeal is that the execution sale is voided because the District Court was required to order an appraisal prior to the sale, with that appraisal having some relevance to the execution sale price. The District Court again rejected this argument without much discussion, no doubt because it is clearly flawed. (CAR 000358-359). As with his other arguments, this is a question of law that is subject to *de novo* review and should be rejected *de novo*. No appraisal was required by statute and the lack of an appraisal would be harmless error.

The District Court did not err by proceeding with execution sale without requiring an appraisal. Idaho Code Section 55-1101 *et seq.* contains some appraisal procedures related to homesteads, but they are not mandatory. The statute states, in relevant part, "When an execution for the enforcement of a judgment . . . is levied upon the homestead, the judgment creditor *may* apply to the probate judge of the county in which the homestead is situated for the appointment of persons to appraise the value thereof." (emphasis added). Thus, the judgment creditor may seek to appraise the property pursuant to the antiquated procedures found in Idaho Code Section 55-1101 *et seq.* but this is not mandated, as is clear from the use of the word "may." *See Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) ("This Court has interpreted the meaning of the word 'may' appearing in legislation, as having the meaning or expressing the right to exercise discretion. When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall.'"); *Walborn v. Walborn*, 120 Idaho 494,

500-01, 817 P.2d 160, 166-67 (1991) ("Our cases have held that the use of the word 'may' rather than the word 'shall' denotes discretion.").

Here, IWHA chose not to use the appraisal procedures, and the District Court did not err by refusing to require a pointless appraisal. In addition, even if an appraisal was mandated prior to sale, McGimpsey has completely failed to show how he was prejudiced by the alleged error. The lack of a recent appraisal was not the cause of a reduced sales price. Rather, the Property sold for a reduced price because it was sold (1) by the sheriff, (2) at auction, (3) without opportunity for prolonged marketing and examination by potential buyers, (4) subject to significant tax liens for unpaid taxes, (5) subject to a six-month statutory redemption right, and (6) subject to on-going abusive litigation by McGimpsey. In fact, if McGimpsey was so concerned about how a recent appraisal could have helped bring in a greater final auction price, then he should have sought the appraisal himself. He chose not to pay for an appraisal, and he cannot now claim that a more recent appraisal would have made an impact on the ultimate price obtained.

Again, McGimpsey has no non-frivolous argument for how an appraisal was mandated by statute or how he was prejudiced by the lack of an appraisal.

IV. ATTORNEY FEES ON APPEAL

Respondents are Entitled to Attorney Fees on Appeal Pursuant to Idaho Code § 12-121 and I.A.R. 41(a).

Idaho Rule of Civil Procedure 54(e)(1) governs the award of attorney fees. It states:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party

> or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

"Idaho Rule of Civil Procedure 54(e)(1) 'creates no substantive right to attorney fees, but merely establishes a framework for applying I.C. § 12-121.'" *Newberry v. Martens,* 142 Idaho 284, 292, 127 P.2d 187, 195 (2005) (citing *Huff v. Uhl,* 103 Idaho 274, 277 n. 1, 647 P.2d 730, 733 n.1 (1982)). According to the Idaho Supreme Court:

> Attorney fees on appeal are appropriate under that statute [Idaho Code § 12-121] only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. Where an appeal turns on the question of law, an award of attorney fees under this section is proper if the law is well settled and the appellant has made no substantial showing that the district court misapplied the law.

Wait v. Leavell Cattle. Inc., 136 Idaho 729, 799, 41 P.3d 220, 227 (2001) (emphasis added) (citation omitted).

None of the eight legal issues raised on appeal have any merit. As discussed above, they are all easily resolved through the straightforward application of the settled law. The District Court properly concluded that "McGimpsey raised not one legitimate issue." (CAR 000322) These same unreasonable and frivolous arguments have now been repeated on appeal. This frivolous appeal is just the latest, and hopefully the last, of McGimpsey's many attempts to misuse the legal system in order to increase the costs to IWHA. McGimpsey has previously

been told by three different courts that his defense against IWHA is frivolous.[3] McGimpsey has multiplied this litigation in every way that he could imagine. McGimpsey should not be allowed to continue to abuse the legal system. Plaintiff respectfully requests that all of its attorney fees and costs be awarded against McGimpsey.

V. CONCLUSION

For all of the reasons stated above, the District Court did not commit error in granting default judgment against Sterling Mortgage, granting summary judgment to IWHA, and granting fees and costs to IWHA, and the District Court did not commit any error during the execution sale process. The Respondents respectfully request that this Court affirm the District Court's decisions in all respects and that the Respondents be awarded costs and attorney fees for defending against this frivolous and unreasonable appeal.

[3] Sadly, several other Montana courts have already sanctioned McGimpsey for his improper use of the legal process during his days as an attorney in Montana. From just the cases that have been reported in Westlaw, Plaintiff's counsel uncovered three prior instances where McGimpsey was involved in frivolous litigation. *See In re Estate of Bayers*, 304 Mont. 296, 302, 21 P.3d 3, 7 (Mont. 2001) (affirming district court award of attorney fees against McGimpsey in the amount of $1,500 because he was "playing games" and prolonging the matter "unreasonably and vexatiously" and then finding that he had continued in the same vein on appeal and would also be assessed personal liability for attorney fees and costs on appeal); *Spoonheim v. Norwest Bank Montana, N.A.*, 277 Mont. 417, 422, 922 P.2d 528, 531 (Mont. 1996) (concluding that the "appeal was without substantial or reasonable grounds and damages are appropriate"); *Matter of Estate of Barber*, 239 Mont. 129, 149, 779 P.2d 477, 489 (Mont. 1989) (finding "no substance in the objections made," noting four unsuccessful appeals, that the "District Court file is a record of obstreperous, obstructive and groundless objections," and then determining that "[t]he District Court file, and the appellate record evince that the attorney for the Objectors is essentially responsible for the troubles in this estate" such that McGimpsey was ordered to pay $1,500).

RESPECTFULLY SUBMITTED this 13th day of July, 2012.

GREENER BURKE SHOEMAKER P.A.

By _____
Fredric V. Shoemaker
Loren K. Messerly
Attorneys for Plaintiff
Island Woods Homeowners Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2012, a true and correct copy of the within and foregoing instrument was served upon:

Philip P. McGimpsey
P.O. Box 1365
Eagle, ID 83616
[Defendant *Pro Se*]

- ☑ U.S. Mail
- ☐ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Delivery

_____
Fredric V. Shoemaker
Loren K. Messerly